

APR 29 1983

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No. 82-1736

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BAHIDJ B. SABOUNI, an individual,
SABOUNI AND ASSOCIATES,

petitioner,

v.

JAMES M. LEAVER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PARTIES

Respondents are JAMES M. LEAVER, an individual, and S-3 CONCRETE PRODUCTS, INC., a now dissolved California corporation.

Petitioner is BAHIDJ B. SABOUNI, an individual, and SABOUNI & ASSOCIATES is a dba of BAHIDJ B. SABOUNI.

No other parties, businesses or entitles have any interest in this litigation.

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Respondents, plaintiffs below, respectfully request this Court deny the petition for Certiorari for the reasons herein advanced. Respondents are hereinafter referred to as "plaintiffs LEAVER."

OPINIONS BELOW

On the jury verdicts (see Jury Verdicts, infra) the district court entered judgment for plaintiffs on December 11, 1980. (Petition at A-16 and A-17). Petitioner appealed, and on November 30, 1982 the Court of Appeals for the Ninth Circuit affirmed the jury verdicts in every respect, but remanded the case for clarification on the attorney's fees awarded by the district court. (Petition at A-1 to A-5). Petitions for rehearing in the Court of Appeals were denied on January 3, 1983. See Separate Appendix to petition at 10.

JURISDICTION

petitioner seeks to invoke jurisdiction under 28 U.S.C. §1242(1) which is permissive jurisdiction by certiorari from the January 3, 1983 denial of rehearing of the Memorandum Opinion dated november 30, 1982 of the Court of Appeals for the Ninth Circuit, Appeal No. 81-4128.

STATEMENT OF THE CASE

A United States patent is involved in this case. Petitioner obtained U.S. Patent 3,247,294 (Petition, at A-100-105) on a process to manufacture light-weight concrete using components which were well known in the prior art. petitioner alleged in his patent and claims that if one puts "pressure" on a wet cement mix contained in a vessel and maintains this pressure until the mix dries or sets, he will get a light-weight concrete having increased strength. (See Petition, at A-102: col. 1, lines 11-15).

At trial the patented process was debunked as a farce; three experts familiar and skilled in the art of concrete technologies stated unequivocally the claimed process did not work (Litvin, TR 782, 789, 812 and 820); (Shukla, TR 1615 and 1624); (Salladay, the Magistrate's expert, TR 342, 345-6, 353, 354, 370). Also, plaintiffs LEAVER conducted extensive tests proving the process did not work (TR 233-237). Based on the evidence, the jury returned verdicts with a special finding that the process was inoperable, i.e., the process simply did not work. (See Jury Verdicts, Petition at A-7 to A-12).

Petitioner had entered into various written arrangements with the plaintiffs LEAVER entitled "Agreement for Sale of Patent Rights" (two), "Partnership Agreement," and a "Security Agreement." (Copies are attached to petition at A-49 to A-94).

The jury found the plaintiffs LEAVER were entitled to rescind these agreements, except the

Partnership Agreement which the jury found was breached. (See Jury Verdicts, supra).

The Court of Appeals for the Ninth Circuit affirmed the judgment entered by the district court on the jury verdicts, but remanded for clarification on attorney's fees, which fees were awarded by the district court. (See Separate Appendix to Petition, at 16). Since the district court has not rendered any decision on remand, the issue of attorney's fees is not before this Court, assuming the remainder of the case is now ripe for review.

RESTATEMENT OF QUESTIONS PRESENTED

I

Did **Lear, Inc. v. Adkins** 395 U.S. 653 (1967) abrogate the common law rule that a contract can be rescinded where there is a complete failure of consideration, as codified in California Civil Code §1689, solely because a patent is involved in the contract?

II

Can the verdicts of a jury, which are supported by substantial evidence, be dissected and restructured by petitioner so they can be viewed as being inconsistent, where the petitioner invited the form of the verdicts at trial by not requesting clarifying instructions or objecting to the instructions given?

III

Was it prejudicial error to admit a Magistrate's Report finding the patented process inoperable, where:

(a) Petitioner stipulated to proceedings before the Magistrate;

(b) The Magistrate's expert Salladay, who testified before the Magistrate, also appeared at trial and again testified the process was inoperable;

(c) Petitioner was unable to prove at trial expert Salladay's tests did not follow the claimed process; and

(d) The Court entered the Magistrate's Report in evidence without reading it to the jury and with the qualifying instruction, to wit:

"You, the jury, should give the Report of Magistrate Woodruff whatever weight you deem appropriate."?

IV

Was the petitioner denied due process where he had ample opportunity to cross-examine all the experts at trial, including the expert selected by the Magistrate, as well as present his own experts, merely because the technology involved cement processes, which only petitioner alleges are complex?

NO ISSUES OF IMPORTANT PUBLIC POLICY ARE INVOLVED

The current case merely involves the application of state and federal law to facts found by a jury. No issue of public policy is raised by the petition.

ARGUMENTS ON QUESTION NO. I

I

THE RULE OF **LEAR V. ADKINS** DID NOT
ABROGATE THE COMMON LAW OR THE LAW
OF THE STATE OF CALIFORNIA.

Simply put, petitioner's argument is that plaintiffs (respondents) should not be entitled to recover \$62,083.00 paid to petitioner under an Agreement of Sales of Patent Rights which is reproduced in the Petition at A-79 to A-87. In **Lear, Inc. v. Adkins** 395 U.S. 653 (1967), this Court held that a contractual provision estopping a licensee from challenging the validity of a licensed patent was void for reasons of public policy. **Lear** at 670. The doctrine of "licensee estoppel" was thus laid to rest.

Appeal courts subsequent to **Lear** have held that a licensee cannot recovery royalties paid to

a licensor before a licensee contests the patent rights of the licensor and the contract claim for royalties, e.g., **St. Regis Paper Co. v. Royal Indust.** 525 F.2d 309, 312-324 (9th Cir. 1977), cert. denied 434 U.S. 99.

To develop an ostensible conflict, petitioner reconstrues the agreements entitled "Agreement of Sales of Patent Rights, authored by him, as "licenses" as opposed to "assignments," citing **Waterman v. MacKenzie** 138 U.S. 29 (1890). However, petitioner never raised this issue at the district court level.¹

In affirming the judgment, the Court of Appeals quite properly observed:

"The jury held only the agreements of sale of patent right to be rescinded. . . . The jury had ample evidence from which it could properly find the \$62,083 paid by Leaver was consideration for an installment sale of patent rights. . . ." (See Separate Appendix, p. 6).

¹See Federal Rules of Civil Procedure, Rule 51; **Palmer v. Hoffman** (1943) 318 U.S. 109.

More importantly, the theory underlying St. Regis, supra, is not applicable where a grantee fails to receive any consideration under an assignment. Here, the jury undisputably found that the patented process sold to plaintiffs LEAVER was inoperable, i.e., it would not work!

Traditionally at common law where there is a total failure of consideration in any agreement, the party entitled to such consideration has a right to rescind. This is codified in California Civil Code §1689 stating inter alia:

"§ 1689. Grounds

(a) A contract may be rescinded if all the parties thereto consent.

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

...."

Under **Erie R.R. Co. v. Thompkins** 304 U.S. 64 (1938), state law controls contract disputes before the federal courts.

The proposition petitioner now advances is that **Lear, supra**, overruled the statutory law of California, to wit, Civil Code §1689, when this Court ruled public policy requires that a licensee be permitted to attack validity of a licensed patent where the license contained a patent incontestability clause.

However, well prior to **Lear, supra**, it was possible to rescind an agreement involving a patent where there was fraud or a failure of consideration.² For example, in **Hat-Sweat Mfg.**

²See exceptions to licensee estoppel: **Lear, Inc. v. Adkins** (1967) 395 U.S. 653, 663-68.

Co. v. Waring et al. 46 Fed. 106106 (DC NY 1891) a licensee was allowed to rescind because of misrepresentation regarding the amount of royalties being paid by other licensees. By contrast here, the petitioner's process did not work according to the jury and plaintiffs LEAVER received no consideration whatsoever.

Thus, in the pre-**Lear** era, an assignee, such as plaintiffs LEAVER, could always rescind an agreement where there was fraud or a total failure of consideration, This was true even if the assignment contained a patent incontestability clause. As stated in Deller's Walker on Patents 2nd ed, §358:

"An assignee of a patent who has acted under an assignment is estopped to deny the validity of the patent. But he may not be estopped to assert failure of consideration due to the worthlessness of the patented device." (at 437)

This follows since the theory of rescissions is not based on the validity of the patent, but on failure of a consideration.³

In **Smith v. Hightower** (1886) 76 Ga. 629, 630 the court observed:

"There was no error in overruling a demurrer to the plea. It rested on the ground that defendant did have the right to sell in those counties, and therefore the consideration did not fail; but it is hard to understand of what value is the exclusive right to sell a worthless thing, totally unfitted for the use for which it was manufactured; and, if valueless, we do not see where the consideration to sell it can be found."

Lear did not set up a bar to an assignee where a patent, which is totally devoid of any useful value, might be pawned off on an unsuspecting member of the public without recourse to rescission. Such a rule would invite fraud and would decry the public policy to be served.⁴

³See **Craddick v. Emery** (1916) 93 Wash. 648, 161 P. 484, 486.

⁴"public policy" is a very unruly horse, and petitioner seeks to ride it in a direction of an unfettered right to commit fraud.

In the reported cases when there has been a failure of consideration rescission is proper. For example, in **Fairchild Stratos Corp. v. Siegler Corp.** 225 F.Supp. 135 (DC Md. 1963) a boat manufacturer purchased a metal forming press to make boats. The press never made an acceptable metal boat. Significant time was spent in reworking the press and in experimentation. Rescission was awarded the boat company, along with recovery of consequential damages. In **Comings v. Leedy** (1893) 14 Mo. 454, 21 S.W. 804, 810, the facts and the conclusion of the court were stated in the following language:

"The original note was given for the sole right to make, use, and vend in the state of Colorado, a patent right improvement in what is called a 'sad iron,' of which Smallstig, one of the payees, claimed to be the patentee. The consideration expressed in the bill of sale is \$5,500. . . . The only consideration for either of the notes was the right to the state of Colorado in the patented iron, which the evidence shows is worthless and unsuited to the purpose for which it was made. The adaptation of a machine to the uses for which it is made is

always warranted. **Smith v. Hightower** 76 Ga. 630; Daniel on Negotiable Instruments, §203, p. 226. So generally, if the thing purchased was entirely worthless when purchased, there is a total failure of consideration. **Arnold v. Wilt** 86 Ind. 367; **Brown v. Weldon** 27 Mo. App. 251."

Accord **Iobdell v. Miller** (1952) 114 C.A. 2d 328, 343; 250 P.2d 357.

St. Regis, supra, prevented recovery of pre-litigation royalties because the licensee in **St. Regis** enjoyed the commercial benefits, as well as wielding the patent sword against its competitors and received the protection of the shield of quiet enjoyment for the use of the patented subject matter, until the lawsuit commenced. By contrast, plaintiffs **LEAVER** had no commercial benefit, had no sword and had no shield since the patented process was worthless.

Evidence at trial demonstrated the petitioner's patented process never worked for anyone. Prior grantees testified they could not get the process to work, even with the assistance

of an expert sent by petitioner to help them (TR 993-994).

Upon the factual finding of inoperability, the jury properly found rescission because of a total failure of consideration.

CONCLUSION ON QUESTION NO. I

As to Question No. I, no error exists in the proceedings below which are consistent with established principals of law. Lear v. Adkins, supra, and its progeny never abrogated the right to rescind where the transferee received nothing by way of consideration.

* * * * *

ARGUMENTS ON QUESTION NO. II

* * * * *

I

UNDER WATERMAN V. MACKENZIE
138 U.S. 252 (1890) ASSIGNMENTS TO
PART OF THE UNITED STATES ARE
ALLOWED.

Title 35 U.S.C. §261 provides in part, as follows:

"Ownership; Assignment

Subject to the provisions of this title, patents shall have the attributes of personal property.

Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing. The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States. (emphasis added).

Divisibility of a patent was judicially recognized in the leading decision of **Waterman v.**

MacKenzie 138 U.S. 252, (1890) at 255:

"The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, 1st, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or 3d, the exclusive right under the patent within and throughout a specified part of the United States. A transfer of

either of these kinds of interest is an assignment." (emphasis added)

Reference is made to pages A-79 to A-87 of the petition reproducing the assignment rescinded. In paragraph 2 of this assignment the rights granted are "exclusive" to a part of the United States. Under paragraph 6 thereof the grantee can sue for infringement. Thus, as the **Waterman** court noted at 255 where there is a right to sue infringers with an exclusive grant to all or part of the United States, it is an assignment notwithstanding the terms employed. On the face of the agreements entitled "Agreement for Sale of Patent Rights," (both authored by petitioner), the right to sue infringer is unquestionably granted.

Thus, the Court of Appeals for the Ninth Circuit had ample evidence to support the jury's verdicts on grounds of assignments versus licenses. Assignments differ from licenses.⁵ Under the law of New York before **Lear**, an assignee

⁵The assignor warrants title to his assignee.

could defend a suit for the price on the ground that invalidity of a patent constituted a failure of consideration, whereas a licensee could not question its validity. **Marston v. Swett** (1876), 66 N.Y. 206, 212, 23 Am. Rep. 43; **Herzog v. Heyman** (1897), 151 N.Y. 587, 45 N.E. 1127, 56 Am.St.Rep. 646.⁶

* * * * *

II

THE JURY'S FINDINGS ARE FINAL.

The rules "of the common law" which govern the Supreme Court's re-examination of facts in civil cases within its appellate jurisdiction were addressed in **Capital Traction v. Hof** 174 U.S. 1, 13 (1899) where Justice Gray opined that facts

⁶**Nash v. Lull** (1869) 102 Mass. 60; 3 Am.Rep. 435: "In a suit brought on a promissory note, the only consideration for which is the assignment of an interest in or right under a patent, the question of consideration depends upon the validity of the patent; if the patent is void, the note is of course without consideration. (emphasis added) jury's specific finding of inoperability.

determined by a jury may not be re-examined, unless it is appropriate for the court to order a new trial because of an "error in law."

Thus, petitioner's states arguments about the operability of the patent were laid to rest by the Substantial evidence exists for finding an assignment versus a license to support the jury's verdict as opined by the Court of Appeals.

* * * * *

III

A JURY'S VERDICT IS EMBOSSED WITH
THE PRESUMPTION OF CORRECTNESS.

At trial petitioner never requested any instructions on his alleged rights to retain pre-litigation payments under Lear, supra, and/or its progeny. In fact, petitioner in his Cross-Complaint, sued plaintiffs LEAVER for (1) breach of contract (the same contracts plaintiffs alleged were breached by petitioner); (2) for fraud; and (3) breach of fiduciary duty to a minority

shareholder. The jury found against the petitioner on each and every one of his causes of action in the Cross-Complaint (TR 2071-72). (See Jury Verdicts, Petition at A-7 to A-12).

Thus, the cold light of the record shows that petitioner had his day in court in the adjudication of his rights under several written agreements. The jury did not believe his version of the facts. Therefore, petitioner merely seeks to have the Supreme Court to re-examine the facts relating to his counterclaims, prohibited under Capital Traction Co. v. Hof, supra.

Fitzgerald v. McFadden 88 F.2d 639 (2nd Cir. 1937) at 642 states the rule as follows:

"The law is well settled that if one buys an issued patent and if it later turns out to be invalid, the buyer may disaffirm."

* * * * *

IV

ISSUES NOT RAISED BY WAY OF
INSTRUCTIONS ARE WAIVED.

Federal Rules of Civil Procedure Rule 51
states inter alia:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Absence objection, instructions to a jury are not reviewable. **Hays v. United Fireworks Mfg. Co.** 429 F.2d 836 (9th Cir. 1969), 13 F.R.Serv.2d 12b.1, Case 4; **Wyler v. Fairchild Hiller Corp.** 503 F.2d 506 (9th Cir. 1974); Moore's Fed. Practice, 2nd ed., Vol. 5A, paragraph 51 at 51-59, et seq.

This Court in **Palmer v. Hoffman** 318 U.S. 109 (1943), found no error:

"Where a party might have obtained a correct charge by specifically calling attention of the trial court to the error and what part was correct."

petitioner at trial never requested instructions on differences between "assignments" and "licenses." Further, petitioner never requested instructions about post-challenge

royalties or election of remedies. From **Brown v. Moore** 247 F.2d 711 (3rd Cir. 1957) the general rule can be paraphrased as:

A failure to request (or object to lack of) a charge to the jury results in a loss of the issue, even if a question for the jury on the issue may have existed.

In **Reed v. AMF Western Tool, Inc.** 431 F.2d 345 (9th Cir. 1970) defenses of lack of privity of contract and an express disclaimer were waived by failure to object. Inconsistent instructions without objections creates no error. **Bernstein v. Olian** 77 F.Supp. 672 (DC SDNY 1918), 11 F.R.Serv. 51.33, Case 4. Where there is no objection to interrogatories given to a jury, there is a waiver of any error, **Kirkendall v. Neustrom** 379 F.2d 694 (10th Cir. 1967), even if they are inconsistent.

Petitioner argues (Petition, p. 24) there can be no favorable reconciliation of what he considers inconsistent jury verdicts. However, the record shows he voiced no objections to the instructions (with the exception of the

instruction given regarding the Magistrate's Report). No objections were made the interrogatories answered by the jury. It was the petitioner's obligation to raise the "election of remedies doctrine" if applicable, and not having done so it is not part of the law of the case. These alleged errors are then not reviewable by this Court. F.R.C.P. Rule 51, supra.

CONCLUSION ON QUESTION NO. II

Contrary to petitioner's contention the Court of Appeals, in affirming the judgment, did not rewrite the jury's verdicts. Petitioner waived any issues now raised by failure to raise them at trial.

ARGUMENTS ON QUESTION NO. III

I

ADMISSION OF THE MAGISTRATE'S
REPORT WAS PROPER.

In an effort to resolve the dispute prior to trial, plaintiffs LEAVER sought a reference to a Magistrate. Petitioner stipulated to the reference (CT Doc. #34). The Magistrate appointed an expert, Salladay, to conduct tests submitted by the parties. All of plaintiffs LEAVERS' tests demonstrated inoperability. Likewise, all of petitioner's tests, when compared on a uniform basis, demonstrated inoperability. The Magistrate found the patented process inoperable (Plaintiffs' Exhibit 64). Petitioner understandably did not like the adverse decision.

In a civil jury trial, a Magistrate's report is only advisory. Federal Rules of Civil Procedure Rule 53(e)(3). **Crateo, Inc. v. Intermark, Inc.** 536 F.2d 862, 868 (9th Cir. 1976). The district court made this point clear with a cautionary instruction (TR 2010):

"you, the jury, should give the Report of Magistrate Woodruff whatever weight you deem appropriate."

Importantly, Salladay, the expert upon whom the Magistrate relied and who was suggested to the Magistrate by petitioner, testified at trial (TR 343, 345-6; 353-5 and 370). His trial testimony was the process of the patent did not and could not work. Petitioner had ample opportunity to cross-examine Salladay at trial and to substantiate before the jury, if possible, how plaintiffs LEAVER allegedly "sabotaged the patent" since Salladay had conducted all the tests under the reference. (See irregular and extra-record declaration of Sabouni, Petition, pp. A-95 to A-99, making the sabotage claim).

Further, nothing in the record remotely suggests the district court "forced" the jury to accept the Magistrate's Report. The Court of Appeals accurately stated (Memo. Op. p. 4):

"Sabouni claims the jury instructions were confusing because they implied that the jury was bound by the special master's report. The instructions, however, clearly stated that the jury was free to give the report whatever weight it deemed appropriate."

Petitioner Sabouni could not have had a fairer trial, his depraved declaration to the contrary notwithstanding. Also petitioner Sabouni could have moved the Court to delete any objectionable portions of the Report but did not. See *Conn. Importing Co. v. Frankfort Distilleries* 42 F.Supp. 225, 227 (D.C. Conn. 1940).

Contrary to arguments of the petitioner, his patented process was simple. According to petitioner's testimony, one merely "squeezes" the wet mixture within a container and holds the pressure until the mixture sets to practice his invention. It was a simple mechanical process, not involving the chemistry of concrete or electron microscopes. (See patent reproduced in Petition, A-100 to A-106). From this mechanical application of pressure, according to petitioner, one should get higher strength. The jury found there was no increase in the strength of the concrete made with the process -- the claimed process thus was a nullity.

CONCLUSION ON QUESTION NO. III

No error of law occurred on admissions of the advisory Magistrate's Report, since the same evidence was presented at trial, and petitioner was allowed to cross-examine on evidence before the Magistrate, curing any possible prejudice.

ARGUMENTS ON QUESTION NO. IV

I

THERE IS NO SHOWING PETITIONER
WAS DENIED DUE PROCESS.

petitioner argues in conclusionary terms his patent process was complex. Nothing in the record supports his observations. See claims of the patent reproduced in the petition at A-100 to A-105. The only substantiation for the claim of denial of due process is petitioner's extra-record declaration, containing an abundance of hearsay.

It is submitted such extra-record declarations are not warranted in civil appeals, lest trial de novo by declaration becomes the format of this Court. Plaintiffs LEAVER will not further dignify petitioner's declaration by addressing its stilted remarks.

CONCLUSION ON QUESTION NO. IV

No facts of record support any denial of due process to the petitioner, a disgruntled litigant.

* * * * *

The petition for certiorari should be denied. Further, it is untimely and its form does not comply with the Rules of this Court.

* * * * *

Dated: April , 1983

LAW OFFICES OF JOSEPH L. STRABALA

JOSEPH L. STRABALA
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that I am the attorney for the Respondents herein and that I mailed three copies of RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT to the attorneys for the Petitioner addressed as follows:

DAVID B. BIRENBAUM, ESQ.
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on this 26th day of April, 1983.

LAW OFFICES OF JOSEPH L. STRABALA

JOSEPH L. STRABALA